

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERTA PIPER)	
Claimant)	
VS.)	
)	
BIG LAKES DEVELOPMENT CENTER, INC.)	Docket No. 1,037,810
Respondent)	
AND)	
)	
UNITED WISCONSIN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the December 11, 2009, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was awarded an 8 percent functional disability to the whole body for injuries suffered on October 18, 2007, when claimant was involved in a work-related automobile accident.

Claimant appeared by her attorney, Richard Billings¹ of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Michelle Daum Haskins of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on March 3, 2010.

ISSUE

What is the nature and extent of claimant's injuries and disability as the result of the automobile accident on October 18, 2007? Claimant contends the ALJ erred in not adopting the medical opinion of board certified independent medical examiner Daniel D. Zimmerman, M.D., that claimant had suffered a 22 percent whole body functional impairment. Respondent contends that the ALJ was correct in adopting the 8 percent

¹ Appearing on behalf of Roger D. Fincher.

whole person functional impairment opinion of board certified orthopedic surgeon Edward J. Prostic, M.D., the court appointed independent medical examiner.

FINDINGS OF FACT

Claimant works as a residential advisor with respondent. On October 18, 2007, while riding as a passenger in a car, claimant and the other occupants of the car were involved in an accident. The car claimant was riding in was struck from behind and then hit a vehicle in front. Claimant alleges that she suffered injuries to her chest, neck, ribs, left hip, left shoulder and left elbow. Claimant was wearing her seatbelt and was able to exit the vehicle under her own power. Claimant was treated at the Mercy Regional Health Center emergency room where she complained of central chest discomfort and pain when taking a big breath. No bruising was noted. X-rays of her chest and sternum were normal. Claimant was diagnosed with probable contusion and strain of the chest wall. She was given medicines and discharged. The next day, at the Occupational Health Clinic, claimant again complained of chest pain and was again given medication. Claimant then followed up with Dr. Joseph Schlageck, who noted progressive pain in her neck and left shoulder.

Claimant had a history of left shoulder problems, including a frozen shoulder from 1999, and also prior neck problems. Claimant's medical history is significant. She was diagnosed with fibromyalgia before the October 18, 2007, accident, and discussions were had about having a dorsal column stimulator or pain pump implantation to treat the condition. Claimant had also suffered prior back, neck, knee and hip injuries in May 1992 for which claimant was awarded a 24 percent whole body disability by way of settlement.

Claimant was treated for this accident with medication and physical therapy. A CAT scan of her chest showed no abnormalities and an MRI of her left shoulder showed only mild degenerative osteoarthritic changes. EMG studies indicated right-sided entrapment neuropathy in the form of carpal tunnel syndrome, rated as mild. An MRI of the cervical spine showed broad-based disc bulging at C5-6. Claimant was also treated with groin injections and trigger point injections to her trapezius muscles.

Claimant was referred by the ALJ to board certified orthopedic surgeon Edward J. Prostic, M.D., for an independent medical evaluation (IME) on January 20, 2009. The IME report of January 20, 2009, indicates that claimant had significant complaints to her left shoulder with pain into her left elbow and numbness and tingling into the left ring and little fingers. Claimant could not lie on her left side and had difficulties reaching above shoulder height or behind her neck or back. She had clicking, popping and weakness in the left upper extremity. Claimant also displayed pain in the center of her low back below the waist with radiation to her hips and thighs and occasionally to the left ankle more than the right. The pain also went into her groin. Claimant had aches in her neck, worse when typing or looking up.

Dr. Prostic's physical examination noted mild tenderness posteriorly in the cervical spine with a full range of motion. Cervical x-rays indicated disc space narrowing at C5-6 with some reversal of the lordotic curve. Claimant displayed bilateral periscapular tenderness without obvious spasm. But, no neurologic deficit was noted in either arm. Testing for thoracic outlet syndrome, cubital tunnel syndrome and ulnar tunnel syndrome were all negative.

The examination of the right shoulder was normal. On the left side, there was no heat, swelling, erythema or atrophy noted. There was no crepitus noted, the crossover sign was negative, biceps anchor was intact and impingement signs were negative. Claimant exhibited good strength of flexion and abduction but weakness of external rotation. No instability was noted. Claimant was reluctant to allow flexion or abduction beyond 90 degrees but, when supine, full range of motion was possible.

The lumbar spine allowed forward flexion to 30 degrees with 5 degrees extension beyond neutral. Lateral bend was to 15 degrees on each side and lateral rotation was complete. Claimant was able to walk on her toes and heels, but could only squat minimally, with complaints in her hips. Leg lengths were symmetrical without atrophy. The straight leg maneuver was negative bilaterally both seated and supine. The right hip examination was normal and the left was positive only for pain with the combination maneuver of flexion, abduction and internal rotation. Lumbar spine films displayed disc space narrowing at L5-S1 but no other abnormality was noted. Left shoulder films only displayed demineralization of the greater tuberosity. Claimant was rated at 8 percent to the whole body functionally. The rating by Dr. Prostic does not identify to which body part the rating applies. Additionally, Dr. Prostic does not identify the *AMA Guides* as the source of the rating. However, the December 18, 2008, Preliminary Hearing Order of the ALJ requires that the doctor's opinion be pursuant to the fourth edition of the *AMA Guides*.²

Claimant was referred by her attorney to board certified independent medical examiner and board eligible internal medicine specialist Daniel D. Zimmerman, M.D., for an examination on February 10, 2009. During the examination, claimant reported continued pain in the anterior chest wall, pain and discomfort in the left shoulder and elbow, and sensory symptoms in the fourth and fifth digits of the left hand with those digits sometimes curling up. Dr. Zimmerman diagnosed claimant with intraspinous tenderness from C2 through C7 and severe pain and discomfort consistent with a left-sided Tsetse's syndrome over the mid anterior rib articulations with the sternum.

Dr. Zimmerman assessed claimant a 15 percent permanent partial impairment of function to the whole body for the cervical spine, with 6 percent of that preexisting the October 18, 2007, accident. This results in a 9 percent whole person permanent partial

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

impairment attributable to the October 18, 2007, accident. Claimant was assessed a 16 percent impairment to the left shoulder due to a frozen shoulder syndrome based on range of motion assessments. This converts to a 10 percent whole person impairment. Claimant was assessed a 3 percent impairment of function of the left upper extremity at the elbow level for the capsulitis affecting the left elbow (due to the left shoulder condition). This rating was based on limitations of range of motion. This converts to a 2 percent whole person impairment. Claimant was also assessed a 3 percent whole body impairment for the Tsetse's syndrome. The ratings combined for a 22 percent whole body impairment. Dr. Zimmerman utilized the fourth edition of the *AMA Guides*.³ However, he acknowledged that there was no section of the *Guides* dealing with Tsetse's Syndrome. He utilized the AMA section dealing with pain instead. He acknowledged that claimant displayed symptoms out of proportion to the anatomical findings but did not believe claimant to be an out-and-out malingerer. There were inconsistent findings on sensory perception. He agreed that claimant tested dramatically differently between the first and the second tests. When Dr. Zimmerman examined claimant's left shoulder, claimant was guarding. He determined that claimant was a bit histrionic.⁴

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁵

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁶

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁷

³ *AMA Guides* (4th ed.).

⁴ Zimmerman Depo. at 14.

⁵ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

⁶ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁷ K.S.A. 2007 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁸

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁹

Claimant contends the opinion of Dr. Zimmerman is the most credible. However, several of Dr. Zimmerman’s ratings were based on the complaints displayed by claimant and on her responses to the doctor’s tests. Dr. Zimmerman acknowledged that claimant displayed symptoms out of proportion to the test results and also noted several inconsistencies during the testing. Additionally, claimant tested dramatically differently the second time as compared to the first evaluation.

The Board finds that the opinion of Dr. Prostic, the court appointed independent medical examiner, is the most credible. The Board acknowledges that Dr. Prostic does not mention the fourth edition of the AMA *Guides*¹⁰ in his report. However, the Order of the ALJ requires that the opinion be pursuant to the fourth edition of the AMA *Guides*.¹¹ The Board, being familiar with Dr. Prostic’s experience in workers compensation litigation, accepts the report as the intended result of the ALJ’s Order.

⁸ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁹ K.S.A. 44-510e(a).

¹⁰ AMA *Guides* (4th ed.).

¹¹ AMA *Guides* (4th ed.).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered an 8 percent permanent partial disability to the whole body as the result of the accident on October 18, 2007.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated December 11, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Richard Billings, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge